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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LARRY MIZELL,
Warden, Vienna Correctional Center,
Petitioner,

vs.

GARY WELSH,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals impermissibly intruded into the realm of state law when it, contrary to all prior authority, interpreted Illinois parole guidelines permitting denial of parole based upon the "seriousness of the offense" in a manner inconsistent with the ex post facto clause of the Constitution, where a prior statute granted Illinois parole authorities unfettered discretion in issuing paroles.

TABLE OF CONTENTS

	Pages
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT:	
I.	
The Tenth Amendment Protects The State Of Illinois From The Unauthorized Acts Of Federal Courts As Well As Of Congress And Needs No Further "Legal Support" Beyond The Terms Of That Provision	1
II.	
Where, As Conceded By Respondent, The Illinois Parole Authorities Have Always Had The Right To Consider The Seriousness Of The Offense, The Court Of Appeals Improperly Infringed Upon The State Prisoner Review Board's Discretion By Limiting The Board's Consideration Of This Factor When Considering An Application For Parole	4
III.	
The Statute In Question Does Not Violate The *Ex Post Facto* Clause Where, When Viewed As A Whole, It Provides Substantial Benefits Not In Existence In 1962	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	PAGE(S)
Aswander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	6
Breest v. Helgemoe, 579 F.2d 95 (1st Cir. 1978)	8
Chowell v. Benson, 385 U.S. 22 (1932)	6
Dobbert v. Florida, 432 U.S. 282 (1971)	8
Engle v. Isaac, ... U.S. ....., 102 S.Ct. 1558 (1982)	3
Guzman v. Morris, 644 F.2d 1295 (9th Cir. 1981)	8
Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981)	3
In re Evans, 452 F.2d 1236 (D.C. Cir. 1971)	6
Lindsey v. Washington, 301 U.S. 397 (1937)	2
National League of Cities v. Usery, 426 U.S. 833 (1976)	3
Overall v. Director, No. 74 C 2541 (N.D. Ill. 1974) *aff'd without opinion*, 513 F.2d 634 (7th Cir. 1975)	6
People v. Kinney, 30 Ill.2d 201, 195 N.E.2d 651 (1964)	4
United Transportation Union v. Long Island R.R. Co., 455 U.S. ....., 102 S.Ct. 1349 (1982)	3
Valley Forge College v. Americans United, ... U.S. ....., 70 L.Ed.2d 700 (1982)	1, 2
Weaver v. Graham, 450 U.S. 24 (1981)	2, 4, 5, 8
Welsh v. Mizell, 668 F.2d 338 (7th Cir. 1982)	*passim*

CONSTITUTIONAL PROVISIONS:

United States Constitution, Tenth Amendment 1

STATUTES:

Ill. Rev. Stat. 1962, ch. 38, § 801 8
Ill. Rev. Stat. 1962, ch. 38, § 807 4
Ill. Rev. Stat. 1973, ch. 38, § 1003-3-3 9
Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) 4, 5, 6
Ill. Rev. Stat. 1973, ch. 38, § 1003-6-3 ..... 8, 9

MISCELLANEOUS:

T. Gregory, *Parole*, 35 Chicago Bar Record 7 (1953) 5
Theodore P. Fields, *Illinois Parole and Pardon Adult Parole Decision*, 62 Ill. B.J. 20 (1973) 4, 5
C. Sand, *Sutherland on Statutory Construction*, 4th ed. (1973) 6
Gibbs, *Crime, Punishment, Deterrence* (1976) 6
Regulation 526, Illinois Department of Corrections, Administrative Regulations (Feb. 1, 1978) 8
State of Illinois, Department of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (October 1962; effective June 1, 1962) 9
Prisoner Review Board, *Rules Governing Parole* (1978) 6

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ARGUMENT

I.

THE TENTH AMENDMENT PROTECTS THE STATE OF ILLINOIS FROM THE UNAUTHORIZED ACTS OF FEDERAL COURTS AS WELL AS OF CONGRESS AND NEEDS NO FURTHER "LEGAL SUPPORT" BEYOND THE TERMS OF THAT PROVISION.

The sole defense which the respondent makes to petitioner's claim of a Tenth Amendment violation is to assert that the argument "is without legal support." Resp. Br. at 14. The Tenth Amendment, like all provisions of the Constitution, is self-executing and needs no judicial or legislative imprimatur to effect its purpose. The language of that provision clearly states the principle that rights not granted to the federal government are reserved by the states. The right to rewrite state parole schemes in the manner undertaken by the court of appeals in this case, in direct contradiction to the manner in which it has allowed the federal system to operate, is clearly not a right derived from any provision of the Constitution and is thus properly reserved to the states.

The respondent's failure to answer petitioner's Tenth Amendment argument is moreover symptomatic of his and the court of appeals' persistent attempt to treat the petitioner like any other litigant in the federal court. The opinion below, decided on the allegations of the petition without any remand for the true facts, completely fails to recognize the petitioner's status as the representative of a sovereign government whose laws are to be overturned only in the most exceptional circumstances. The power of the federal courts "to declare the rights of individuals and to measure the authority of governments . . . is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Valley Forge College v. Americans United*, ... U.S. ....., 70

L.Ed.2d 700, 708 (1982). The allegations of a habeas corpus petition, unsupported by an evidentiary hearing and easily rebutted by reference to available records (see Appendix E of the Petition for Writ of Certiorari), cannot logically be called such exceptional circumstances.

It is obvious that both the petitioner and the court of appeals wish that Illinois' parole law had been drafted in a manner more consonant with their particular views of propriety and justice. But as this Court has recently observed, "the federal courts were simply not constituted as ombudsmen of the general welfare." *Valley Forge College*, 70 L.Ed.2d at 719. The right to reconstruct those parole laws absent a legitimate constitutional defect is not a right granted to the federal court by the Constitution; it is a right reserved to the State of Illinois.

Petitioner's disregard for basic concepts of federalism is further evidenced by his argument that federal questions must be decided by federal courts. Resp. Br. at 13. The principal cited authority, *Lindsey v. Washington*, 301 U.S. 397 (1937), does not contain any such ruling. That case was a proceeding to review on certiorari a decision of the Supreme Court of Washington. Petitioner's alternate authority, *Weaver v. Graham*, 450 U.S. 24 (1981), suffers from the same deficiency: no federal court was involved in this Court's review of a decision of the Florida Supreme Court and there was consequently no ruling whatsoever on the priority of federal court review relative to state court consideration of federal questions.

Of course, the determination of an *ex post facto* claim involves the decision of a federal question, but as respondent's authorities demonstrate, contrary to petitioner's claim, it need not involve a federal court. Article III courts enjoy no monopoly in the consideration and determination of federal constitutional questions. As this Court has recently observed, "The States possess primary au-

thority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights." *Engle v. Isaac*, ... U.S. ...., 102 S.Ct. 1558, 1571 (1982).

The recent decisions of this Court which have recognized the continued viability of the Tenth Amendment are numerous and include *National League of Cities v. Usery*, 426 U.S. 833 (1976), *United Transportation Union v. Long Island R.R. Co.*, 445 U.S. ....., 102 S.Ct. 1349 (1982) and *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264 (1981).

A congressional enactment violates the Tenth Amendment if it (1) regulates "the States as States", (2) addresses "matters that are indisputably 'attribute[s] of state sovereignty,'" or (3) "directly impair[s] [the State's] ability to 'structure integral operations in areas of traditional governmental functions.'" *Hodel*, 452 U.S. at 287-288, quoting *National League of Cities*, 426 U.S. 854 at 852. It must be obvious that the federal courts, which are created and invested with such jurisdiction as they may have by Congress, can have no greater right to legislate policy for the states than does the Congress. The opinion of the Seventh Circuit undeniably addresses a subject matter, the enforcement of the criminal law, which is undisputably an "attribute of state sovereignty." Equally clear is the fact that the State of Illinois' ability to structure an integral operation, the parole system, in an area of traditional governmental functions has been significantly infringed. As noted above, all of this has been accomplished without benefit of an evidentiary hearing or other opportunity for the State to prove the merits of its claim. If the State of Illinois has not reserved this minimal right, to be free from such arbitrary action, in the Tenth Amendment, then there must be very few rights indeed embodied in that constitutional guarantee.

II.

WHERE, AS CONCEDED BY RESPONDENT, THE ILLINOIS PAROLE AUTHORITIES HAVE ALWAYS HAD THE RIGHT TO CONSIDER THE SERIOUSNESS OF THE OFFENSE, THE COURT OF APPEALS IMPROPERLY INFRINGED UPON THE STATE PRISONER REVIEW BOARD'S DISCRETION BY LIMITING THE BOARD'S CONSIDERATION OF THIS FACTOR WHEN CONSIDERING AN APPLICATION FOR PAROLE.

Respondent concedes that the "severity of the offense" criteria was a consideration under the 1962 parole scheme which was in effect when respondent committed the murder for which he is now incarcerated. Resp. Br. at 8. Indeed, parole in Illinois has never been automatic. *Compare* Ill. Rev. Stat. 1962, ch. 38, § 807, *with* Ill. Rev. Stat. 1977, ch. 38, § 1003-3-5(c)(2). Once respondent became eligible for parole, his parole was subject to the discretion of the parole authorities. *Id.*; *People v. Kinney*, 30 Ill. 2d 201, 195 N.E.2d 651 (1964); Fields, *Illinois Parole and Pardon Adult Parole Decision*, [hereinafter referred to as Fields] 62 Ill. B.J. 20, 21 (1973).

Therefore, what is in issue, in the instant case, is the Prisoner Review Board's discretionary denial of respondent's parole, not respondent's eligibility for parole. The court of appeals has thus impermissibly intruded into the realm of the Prisoner Review Board's discretion. The Court intruded by limiting, if not completely eliminating, the Review Board's ability to consider a factor, the seriousness of the offense, which, as now conceded by the respondent, has always been subject to consideration. See Resp. Br. at 8.

The vehicle by which the Seventh Circuit entered into the realm of state discretion was *Weaver v. Graham*, 450 U.S. 24 (1981). *Welsh v. Mizell*, 668 F.2d 328 (7th Cir. 1982) (See Appendix A of the Petition for Writ of Certiorari). The

Weaver case dealt with gain time, an automatic calculation, which does not involve the exercise of a discretionary function. *Weaver* cannot logically be utilized in such a way as to impinge upon a state parole board's discretion to grant or deny parole. This Court must keep in mind that the Prisoner Review Board was not required to find anything with regard to respondent's crime. Furthermore, the seriousness of the offense, as petitioner has always maintained, was considered by the parole board prior to 1973.

In fact, one commentator, *in 1953*, stated, with regard to the parole scheme that was still in effect in 1962, that:

> [The board] may determine for one reason or another that an inmate should not be released at the minimum perhaps because of his previous *criminal record* or the *character of his crime*, or the opinion of professionals or his conduct in the institution. . . . The issuance of such discharge is within the discretion of the board. . . .

T. Gregory, *Parole* 35 Chicago Bar Record 7, 10 (1953) (emphasis added). Furthermore, in 1973, another authority stated:

> The statute (Ill. Rev. Stat. 1973, ch. 38 § 1003-3-5(c)) sets forth the general criteria for denying parole that have been followed by the board for some time.

Fields, *supra* at 21.[1] Therefore, the Parole Board, in 1962, could have based a parole decision on an inmate's criminal record or the character of his crime. *Id.*

The 1973 statute does not have an *ex post facto* effect. The statute provides, in pertinent part, that parole shall be denied if the board finds that an inmate's:

> [R]elease at that time would deprecate the seriousness of *his* offense or promote disrespect for the law.

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[1] The Fields article was cited by the court of appeals for a different proposition. (*See Welsh* at 331, fn.3).

Ill. Rev. Stat. 1973, ch. 38, § 1003-3-5(c) (emphasis added). The statute does not state *to whom* it would "deprecate the seriousness of his offense or promote disrespect for the law." *Id.* Assuming for the sake of argument that general deterrence could not, as the court of appeals held, be considered, then it would be implicit that the statute is directed to the individual parole applicant, as courts are required to interpret statutes whenever possible to avoid significant constitutional difficulties. *In Re Evans*, 452 F.2d 1239 (D.C. Cir. 1971); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936); *Chowell v. Benson*, 285 U.S. 22, 62 (1932); *See also*, C. Sand, *Sutherland On Statutory Construction*, § 45.11 (4th ed. 1973). This interpretation would save the statute from being unconstitutional. It would not be *ex post facto* because special deterrence and prevention of recidivism have always been major concerns in parole determinations. *See* Petition for Writ of Certiorari at 17-21. *See generally* Gibbs, *Crime, Punishment, Deterrence* (1976) at 67. The focus on special deterrence and recidivism is evident by the fact that the Board is required to consider not only the character of the crime but also the aggravating and mitigating circumstances in determining whether the prisoner is fit to be released on parole. Prisoner Review Board, *Rules Governing Parole* (1978) Rule V(B). Therefore, assuming that general deterrence could not be considered, the 1973 statute is not unconstitutional as it does not alter the Board's essential balancing process through which it exercises its discretion.

However, petitioner is not conceding that general deterrence was not considered under the 1962 parole scheme. In fact, in *Overall v. Director*, No. 74 C 2541 (N.D. Ill. 1974), *aff'd without opinion*, 513 F.2d 634 (7th Cir. 1975), a case decided in closer proximity to the change in the statutes, it was specifically noted that general deterrence was considered. See Petition for Writ of Certiorari, Appendix G at 46a-47a.

Although respondent now concedes that seriousness of the offense was a consideration under the old parole statute, that is not to say that courts will not interpret *Welsh* as precluding the consideration of the seriousness of the offense in denying parole. In *Ware v. Kaufman*, No. 80 C 3204 (N.D. Ill. 1981), cited in Appendix H to the Petition for Writ of Certiorari at 53a, the district court originally held that the statute was not *ex post facto*. *Id.* at 58a-60a. However, believing itself bound by the *Welsh* case, that court in an opinion contained in Appendix B of Respondent's Brief in Opposition subsequently held that:

> [T]he decisions to deny parole to the plaintiffs *based on the seriousness of their offenses violated the ex post facto clause* . . . . and that the plaintiffs are entitled within a short period of time to a new parole hearing and decision in accordance with the Seventh Circuit's decision in *Welsh*. . . . *Id.* at 5a (Emphasis added).

That district court failed to make the distinction that respondent makes between the "seriousness of the offense" factor as it relates to rehabilitation or otherwise. Rather that factor was completely banished from any further parole consideration. Respondent's "concession" is, therefore, illusory.[2]

Thus, the preclusion or severe limitation of the consideration of this factor that has always been considered by the parole authorities makes it imperative that this Court grant certiorari.

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[2] One can presume that upon the preclusion from the consideration of the seriousness of his offenses, the review board was compelled to release Mr. Ware, who was serving a concurrent sentence of 25-30 years for aggravated kidnapping and 10-20 years for rape.

III.

THE STATUTE IN QUESTION DOES NOT VIOLATE THE *EX POST FACTO* CLAUSE WHERE, WHEN VIEWED AS A WHOLE, IT PROVIDES SUBSTANTIAL BENEFITS NOT IN EXISTENCE IN 1962.

In *Weaver v. Graham*, 450 U.S. 24 (1981), this Court held that the critical question in determining whether a law contravenes the *ex post facto* clause is "whether the new provision imposes greater punishment after commission of the offense." 450 U.S. at 32 n.17. It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law. *Dobbert v. Florida*, 432 U.S. 282, 294 (1971); *See also Guzman v. Morris*, 644 F.2d 1295 (9th Cir. 1981); and *Breest v. Helgemoe*, 579 F.2d 95 (1st Cir. 1978). Further, the two statutory schemes must be compared *in toto* to determine if the new law may be fairly characterized as more onerous. *Dobbert*, 432 U.S. at 296-298; *Breest*, 579 F.2d at 103.

Unlike the situation in *Weaver v. Graham*, 450 U.S. 24 (1981), the 1973 statute held to be *ex post facto* in *Welsh*, provides more than mere illusory benefits to parole applicants. Nondiscretionary, compensatory good time, allowing for *90 days reduction from sentence* for every year served is provided. *See Ill. Rev. Stat.* ch. 38, § 1003-6-3 (1973) and Regulation 526, Illinois Department of Corrections, Administrative Regulations (Feb. 1, 1978). Under 1962 law there was a one third limit on the amount of credit to be granted against the maximum sentence. In 1973, the limitation on the amount of credit to be applied to the maximum sentence was dropped.

In addition, parole eligibility under the 1973 statute is much earlier than in 1962. For example, in 1962, Mr. Welsh was required to serve his minimum sentence of 60 years less good time which computes to *31 years and 3 months*, before he would have been eligible for parole. *Ill. Rev. Stat.* 1962, ch. 38, § 801. *See* State of Illinois, Depart-

ment of Public Safety, Parole and Pardon Board, *Rules and Statutes Relating to Parole and Pardon* (1962) at 52 (for computation of good time credits) (hereinafter cited as *Rules Governing Parole*, 1962). However, in June of 1962, a regulation was enacted which fixed the *earliest* eligibility date to Mr. Welsh, a person who had a 60 year minimum sentence, as being *20 years*. *Rules Governing Parole*, 1962 at 17.

In 1973, in conjunction with the provision at issue, the legislature enacted *Ill. Rev. Stat.*, ch. 38, § 1003-3-3 allowing for eligibility in 20 years *less good time* to a person such as Mr. Welsh, who had a 60 year minimum sentence. With this new good time allowance, Mr. Welsh became eligible for parole in 11 years and 3 months. Furthermore, the 11 year and 3 month eligibility gained under the 1973 statute was further reduced by the previously mentioned provision for compensatory good time. (i.e., 90 days for every year served.) *Ill. Rev. Stat.* 1973, ch. 38, § 1003-6-3.

Therefore, respondent is in error in his contention that the 1973 law impaired parole eligibility. See Resp. Br. at 8. However, even if it is assumed that the promulgation of the "seriousness of the offense" criterion constitutes an increase in penalty, respondent has no constitutional entitlement to selectively choose the most favorable provision of separate parole schemes when the later scheme, considered *in toto*, does not increase his punishment. But for the enactment of the parole scheme which petitioner now challenges, he would not have been eligible for parole for 20 years (i.e., at the earliest 1982). The decision of the Seventh Circuit, that respondent may choose those provisions of each scheme which best suit him, is simply an indefensible intrusion by a federal court of appeals into the State of Illinois' legitimate interest in refining and clarifying its parole system.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the court of appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

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